STATE OF MICHIGAN

COURT OF APPEALS

ERIC KORPAL AND MARY KORPAL,

Plaintiffs-Appellees,

v

SAMUAL J SHAHEEN, MD, MIDWESTERN SURGICAL ASSOCIATES, PC, and COVENANT HEALTHCARE,

Defendants,

and

STEPHEN A MESSANA, DO, SCOTT CHENEY, MD, and ADVANCED DIAGNOSTIC IMAGING, PC,

Defendants-Appellants.

UNPUBLISHED
December 28, 2006

No. 266418
Saginaw Circuit Court
LC No. 03-049832-NH

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendants Dr. Messana and Dr. Cheney and their employer, Advanced Diagnostic Imaging P.C. (ADI), appeal by leave granted the trial court's order denying their motion for partial summary disposition. On January 3, 2002, defendant Dr. Shaheen performed a laparoscopic Nissen fundoplication on plaintiff Eric Korpal at Covenant Healthcare Hospital for his gastroesophageal reflux disease. In this operation, a part of the stomach (the fundus) is wrapped or folded (a plication) around the lower end of the esophagus, to prevent stomach contents from entering the esophagus. The essence of plaintiffs' malpractice claim is that defendants failed to timely diagnose and treat an intestinal leak that developed as a complication of the surgery. Defendants Messana and Cheney interpreted post-operative CT scans on January 5 (Messana) and January 7 (Cheney) and chest x-rays on January 5, 6 (Messana) and 7 (Cheney). Although plaintiffs did not mention chest x-rays in either their notice of intent (NOI), MCL 600.2912b, or their affidavit of merit (AOM), MCL 600.2912d, plaintiffs included allegations of malpractice regarding the January 5, 6 and 7 chest x-rays in their complaint. Defendants contend the trial court erred by not granting their motion for partial summary disposition and dismissing that portion of plaintiffs' complaint regarding the chest x-rays. We agree and remand for entry of partial summary disposition in favor of appellants.

On January 9, 2003, plaintiffs' counsel sent a NOI to each defendant that in part I stated the factual basis of plaintiffs' claims. Plaintiffs' alleged that Dr. Messana incorrectly read the January 5 CT scan and that Dr. Cheney misread the January 7 CT scan. The factual basis in the NOI does not refer to defendants' readings of chest x-rays. Plaintiffs stated in part II of the NOI that the applicable standard of care required "proper review and interpretation of radiology studies." But in describing the manner of defendants' alleged breach of the standard of care, plaintiffs in part III of the NOI state only that "Dr. Messana failed to properly review and interpret the CT scan of January 5, 2002" and that "Dr. Cheney failed to properly review and interpret the CT scan of January 7, 2002." In part IV of the NOI, regarding the actions defendants should have taken or omitted, plaintiffs only refer the reader to parts II and III of the NOI.

On September 25, 2003, plaintiffs filed their complaint against defendants. Plaintiffs attached to the complaint a September 23, 2003 AOM signed by Michael Potchen, M.D., a board certified radiologist. Dr. Potchen opined that the applicable standard of care included "proper review and interpretation of radiology studies" and "timely notification of primary physician of abnormal findings." But Dr. Potchen opined that Drs. Messana and Cheney breached the standard of care only in failing to properly review and interpret the CT scans. Dr. Potchen also faulted Drs. Messana and Cheney for failing to recognize and note in their respective reports certain aspects of the CT scans indicative of an intestinal leak. Dr. Potchen further opined that Dr. Cheney "failed to recognize and relay to the clinician the potentially life-threatening findings which were present on the January 7, 2002 CT scan." Nowhere in Dr. Potchen's affidavit does he mention any actions or omissions by either Dr. Messana or Dr. Cheney with respect to their interpretations and handling of chest x-rays on January 5, 6, and 7, 2002.

Despite not being included in either plaintiffs' NOI or the AOM, plaintiffs' complaint included allegations regarding the chest x-rays, which are the subject of this appeal. The relevant portions of plaintiffs' complaint against Drs. Messana and Cheney, with the specific allegations at issue noted in italics, follow:

> (f) Stephen A. Messana, D.O., failed to properly review and interpret Eric Korpal's CT scan taken on January 5, 2002, *as well as the chest x-rays taken on January 5 and January 6, 2002*, at Covenant Healthcare Hospital;
>
> (g) Scott Cheney, M.D., failed to properly review and interpret Eric Korpal's CT scan taken on January 5, 2002, *as well as the chest x-rays taken on January 5 and January 6, 2002*, at Covenant Healthcare Hospital;
>
> * * *
>
> (i) *Dr. Messana failed to recognize and report to the clinician in a timely manner, the abnormal, worsening (from January 5) and potentially life-threatening findings present on the January 6, 2002 chest x-ray taken at Covenant Healthcare Hospital*; [Complaint, ¶ 23]

Neither the NOI nor the AOM mention any act or omission on the part of ADI that proximately caused an injury to plaintiffs. Plaintiffs' complaint asserts only that ADI is vicariously liable for the actions of its employees, Drs. Messana and Cheney.

On September 6, 2005, Dr. Cheney and ADI filed a motion for partial summary disposition of plaintiffs claims about Cheney's interpretation of the chest x-rays on the basis that plaintiffs failed to include any such allegations in either the NOI or AOM. Dr. Messana filed a similar motion for partial summary disposition. Defendant Covenant Hospital filed a concurrence as to both motions, seeking summary disposition of the claims of its vicarious liability for the alleged negligence of Drs. Cheney and Messana regarding the chest x-rays.

After hearing arguments on the motions, the trial court issued an opinion and order on October 14, 2005, denying defendants' motions. Although the trial court found that the NOI and AOM referred to defendants' actions or omission regarding the CT scans, relying on *Roberts v Mecosta Co Gen Hosp*, 470 Mich 679; 684 NW2d 711 (2004) (*Roberts II*), the trial court ruled a plaintiff's pleadings are not limited to the statements made in the NOI and that to satisfy the statute, a plaintiff need only make a "good faith attempt to answer the statute's queries." The trial court held that plaintiffs' NOI had easily satisfied the requirements of the statute, placing defendants on notice that the proper standard of care pertained to the "proper review and interpretation of radiology studies." The trial court observed that "had Plaintiffs continued to simply use the phrase 'radiological studies,' instead of specifying one of those studies by name (a CT scan), that they would have satisfied the requirements of the statute." The trial court reasoned that "[i]t would be improper to limit a plaintiff simply to the alleged manner of breach of the standard of care set forth by the Notice of Intent before any formal discovery has occurred and plaintiff has had the opportunity to redefine their theories and add newly discovered information."

The trial court distinguished *Roberts II*, and this Court's decision in *Gulley-Reaves v Baciewicz*, 260 Mich App 478; 679 NW2d 98 (2004), on the basis that those cases presented situations where a NOI was fundamentally flawed by the total failure to answer one or more of the statutory questions.

The trial court's analysis of plaintiffs' AOM was brief. The court merely observed that the purpose of the AOM is to deter the filing of frivolous malpractice claims, and that the AOM here "amply supports [plaintiffs'] claims of misreading of the radiological studies by Dr. Messana and Dr. Cheney." Thus, the court concluded that plaintiffs' claims were not frivolous, and the AOM "has served its purpose."

We review de novo issues of statutory interpretation and a trial court's decision regarding a motion for summary disposition. *Gulley-Reaves, supra* at 484. We conclude that the trial court erred by not granting defendants motion for partial summary disposition. Because plaintiffs' NOI totally excluded any reference to defendants committing malpractice in connection with the chest x-rays, plaintiffs may not include such claims in their complaint. *Id*. at 484, 490. Accordingly, the trial court erred by not granting defendants' motion to strike plaintiffs' claims regarding chest x-rays.

In relevant part, MCL 600.2912b provides:

> (1) Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.

* * *

> (4) The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:
>
> (a) The factual basis for the claim.
>
> (b) The applicable standard of practice or care alleged by the claimant.
>
> (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.
>
> (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.
>
> (e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.
>
> (f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.

In *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 59, 70-71; 642 NW2d 663 (2002) (*Roberts I*), our Supreme Court held that unless notice is given in compliance with all the provisions of MCL 600.2912b the statute of limitations cannot be tolled under MCL 600.5856(d). Further, a plaintiff alleging malpractice has the burden of complying with the notice of intent requirements and it is not incumbent on a defendant to challenge any deficiencies in the notice before the complaint is filed. The Court held with respect to MCL 600.2912b(4), "[t]he phrases 'shall' and 'shall not' are unambiguous and denote a mandatory, rather than discretionary action." *Id*. at 65. Further, the phrase "at least" in § 2912b(4) "plainly reflects a minimal requirement." *Id*. at 66. In sum, the requirements of § 2912b are mandatory; a putative malpractice plaintiff must give a prospective defendant a written notice of intent to sue that contains at a minimum a statement regarding *all* of the topics listed § 2912b(4). *Roberts I, supra* at 66. If not, a plaintiff cannot maintain a medical malpractice action. *Id*.

Our Supreme Court did not express an opinion regarding the plaintiff's compliance with § 2912b in *Roberts I*, but did so after remand in *Roberts II*. We find the trial court's application of *Roberts II* to be misplaced. The Court in *Roberts II* found that although the plaintiff's NOI was not wholly deficient with respect to subsection 2912b(4), it was not sufficiently compliant so as to satisfy § 2912b. *Roberts II, supra* at 682. The Court held, "the claimant is required to comply with all the requirements of § 2912b." *Id*. at 686, citing *Roberts I, supra* at 64. In that regard, the Court held that the plaintiff's NOI failed to fully comply with the statutory mandate of MCL 600.2912b(4)(b)-(e).

Specifically, the Court in *Roberts II* held that the plaintiff "fail[ed] to properly set forth allegations regarding the standard of practice or care applicable to each named defendant, allegations regarding the manner in which it was claimed that the defendants breached the applicable standards of practice or care, the alleged actions that defendants should have taken in order to satisfy the alleged standards, or allegations of the manner in which the defendants'

breaches of the standards constituted the proximate cause of the plaintiff's injury." *Roberts II, supra* at 682. First, the Court observed that among the defendants were two different facilities, an obstetrician, an emergency room physician, and a physician's assistant, yet the plaintiff made no attempt to identify a specific standard of practice or care applicable to any particular defendant. *Id*. 692-695. Second, the Court found that the plaintiff's notices simply indicated that the standards of care were breached, rather than indicating the *manner* in which the standards were breached. *Id.* at 696, 701. Third, the Court found that nowhere in the notices did the plaintiff state what actions the various defendants should have taken to comply with the appropriate standards of practice or care. *Id*. at 697. And fourth, the NOI did not state how the defendants' conduct constituted the proximate cause of the plaintiff's claimed injury. *Id.* at 701. Except for a statement of the standard of care, plaintiffs' NOI in this case suffers from similar deficiencies with respect to plaintiffs' claims regarding chest x-rays. The NOI does not state with respect to chest x-rays a factual basis for plaintiffs' claims, in what manner the standard of care was breached, what action defendants should have taken, or how the alleged deficiency constituted the proximate cause of plaintiffs claimed injuries. MCL 600.2912b(4)(a), (c)-(e).

In light of the fact that a NOI comes at the early stage of a malpractice claim, perhaps before all medical records have been obtained by the claimant, and before a lawsuit is filed during which discovery under the court rules can occur, MCR 2.300 *et seq.*, "the claimant is not required to craft [a] notice with omniscience." *Roberts II, supra* at 691. Thus, a claimant is not required to ensure that the statements in the NOI are completely accurate but the claimant must "make good-faith averments that provide details that are *responsive* to the information sought by the statute and that are as *particularized* as is consistent with the early notice stage of the proceedings." *Id* at 701 (emphasis in the original). "The information in the notice of intent must be set forth with that degree of specificity which will put the potential defendants on notice as to the nature of the claim against them. . . . [A]ll the claimant must do is specify what it is that she is *claiming* under <u>each</u> of the enumerated categories in § 2912b(4)." *Roberts II, supra* at 701 (italics in the original; underscore added).

Here, plaintiffs did not make a good faith effort to provide notice of a claim regarding chest x-rays that proved inaccurate. Instead, plaintiffs totally failed to provide any statement about chest x-rays with respect to several mandatory topics listed in MCL 600.2912(b)(4). Plaintiffs never placed defendants on notice of any alleged deficiency regarding defendants' involvement with the chest x-rays until after plaintiffs filed the instant lawsuit. Contrary to the trial court's reasoning, a broad statement of the standard of care in the NOI cannot compensate for the total lack of any statement regarding chest x-rays with respect to the remainder of the statements required by § 2912b(4). "[T]he claimant is required to comply with all the requirements of § 2912b." *Roberts II, supra* at 686; see, also, *Roberts I, supra* at 64. Subsection 2912b(4) provides that "the notice given to a health professional or health facility under this section shall contain a statement of at least" the facts, standard of care, action that should have been taken, breach, proximate cause, and the names of those being notified.

Also contrary to the trial court's reasoning, defendants were afforded no opportunity for settlement negotiations regarding plaintiffs' chest x-ray claims before plaintiffs filed their complaint. See *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 705; 575 NW2d 68 (1997) ("The purpose of the notice requirement is to promote settlement without the need for formal litigation and reduce the cost of medical malpractice litigation while still providing compensation

for meritorious medical malpractice claims that might otherwise be precluded from recovery because of litigation costs.").

Moreover, nothing in the record suggests that plaintiffs were unable to discover their claims regarding the chest x-rays. Plaintiffs filed their NOI with almost one year remaining before the expiration of the statute of limitations, even without considering application of the tolling provision, MCL 600.5856(c). Nothing in the record indicates defendants failed to promptly provide plaintiffs with access to all medical records as required by MCL 600.2912b(5). The statute contemplates the filing of additional notices with respect to subsequently discovered malpractice based on the prompt provision of medical records to a claimant. MCL 600.2912b(6); *Gulley-Reeves, supra* at 486. Further, because the tolling provisions had not been invoked by the initial NOI, a subsequent amended NOI could have been filed to invoke it. See *Mayberry v General Orthopedics, PC*, 474 Mich 1, 7-8; 704 NW2d 69 (2005). Thus, plaintiffs were not precluded from filing an amended NOI to include claims regarding the chest x-rays.

Finally, the instant case cannot be distinguished from this Court's decision in *Gulley-Reeves, supra*. In that case, the plaintiff's NOI alleged malpractice during surgery supervised by Dr. Baciewicz but performed by residents and agents of Sinai-Grace Hospital. *Gulley-Reeves, supra* at 479. The plaintiff's complaint included claims regarding the administration of anesthesia during the surgery by professionals not named as defendants but alleged to be agents of the hospital. *Id*. at 481. The plaintiff filed two affidavits of merit along with her complaint, each of which alleged the cause of the plaintiff's injury was either the surgical procedure or the insertion of a tube during the anesthesia procedure. *Id*. at 482. The defendants moved for summary disposition on the basis that the plaintiff's NOI alleged malpractice with respect to the performance of the surgical procedure itself. *Id*. at 482-483. Specifically, the defendants argued that the NOI, "did not comply with the statutory requirements because it did not advise of the claimed wrongdoing with regard to the anesthesia." *Id*. at 483. The trial court denied the defendants' motion. This Court framed the issue presented to be the same as that presented in the instant case, and answered it contrary the trial court below: "[The] [d]efendants allege that the complaint must be limited to the issues raised in the notice of intent because plaintiff failed to comply with the statutory notice requirements with regard to any claim involving the administration of anesthesia. We agree." *Id*. at 484.

The *Gulley-Reeves* Court also rejected the plaintiff's arguments - similar to the instant case - that NOI's claims regarding the surgical procedure were broad enough to include by inference claims regarding the administration of anesthesia. The plaintiff had argued that her NOI included claims regarding anesthesia "because the allegation that the surgical team caused the injuries was sufficient notice that 'something went very wrong' during the procedure, and anesthesia is an integral part of the surgical procedure." *Id* at 488. In addition, the plaintiff's purported late discovery of her additional theory regarding the administration of anesthesia did not excuse the plaintiff's failure to comply with the plain statutory language. *Id*. at 488-489. The Court applied the "plain, . . . mandatory, language of MCL 600.2912b(4)(c), [to] conclude that the trial court erred in denying [the] defendants' motion for summary disposition." *Gulley-Reeves, supra* at 490.

Likewise, in the present case, plaintiffs' NOI does not state with regard to the January 5, 6, and 7 chest x-ray studies a factual basis for plaintiffs' claims, in what manner the standard of care was breached, what action defendants should have taken, or how the alleged deficiency

regarding the chest x-rays constituted the proximate cause of plaintiffs claimed injuries. Accordingly, the NOI failed to comply with MCL 600.2912b(4)(a), (c)-(e), with respect to plaintiffs' chest x-ray claims. The trial court erred by not granting plaintiffs' motion for partial summary disposition to exclude such claims. *Gulley-Reeves, supra* at 490.

Defendants also argue that the trial court erred by not granting their motion for partial summary disposition on the basis that plaintiffs' AOM failed to include any statements regarding the chest x-rays. We agree. Because plaintiffs' AOM failed to include any reference to defendants committing malpractice in connection with the chest x-rays, plaintiffs may not include such claims in their complaint. *Geralds v Munson Healthcare*, 259 Mich App 225, 240; 673 NW2d 792 (2003); *Mouradian v Goldburg*, 256 Mich App 566, 574; 664 NW2d 805 (2003).

An affidavit of merit is required to be filed with the complaint to properly commence a malpractice action. "MCL 600.2912d(1) . . . provides that the plaintiff in a medical malpractice action 'shall file with the complaint an affidavit of merit . . . .'" *Scarsella v Pollak*, 461 Mich 547, 548; 607 NW2d 711 (2000). Also, the AOM must be framed by the previous claims asserted in the NOI and review of applicable medical records. "The affidavit of merit *shall certify* that the health professional has reviewed *the notice* and *all medical records* supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and *shall contain* a statement of each of the following: a) [t]he applicable standard of practice or care[;] (b) [an] . . . opinion that the applicable standard of practice or care was breached . . . [;] (c) [t]he actions that should have been taken or omitted . . . to have complied with the applicable standard of practice or care[; and] (d) [t]he manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice." MCL 600.2912d(1) (emphasis supplied).

In *Scarsella*, the plaintiff failed to file any affidavit of merit with his complaint but did so after the statute of limitations had expired. Our Supreme Court adopted verbatim this Court's opinion, 232 Mich App 61, 591 NW2d 257 (1998), adding two additional points. *Scarsella, supra*, 461 Mich at 548-550. *Scarsella* held that "for statute of limitations purposes in a medical malpractice case, the mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit." *Id*. at 549. The Court rejected the plaintiff's argument that his complaint could be amended by attaching an AOM with the amendment relating back to the date the complaint was filed because to do so "completely subverts the requirement of MCL 600.2912d(1)." *Scarsella, supra* at 550. The Court also noted the sanction for failure to comply with the AOM statute was dismissal without prejudice, but a new complaint must still comply with the statute of limitations that had not been tolled by the defective complaint. *Id*. at 551-552. In addition, the Court limited its holding to where "a medical malpractice plaintiff wholly omits to file the affidavit required by MCL 600.2912d(1)," expressly stating its "holding does not extend to a situation in which a court subsequently determines that a timely filed affidavit is inadequate or defective." *Scarsella, supra* at 553. The Court noted that "[w]hether a timely filed affidavit that is grossly nonconforming to the [AOM] statute tolls the statute [of limitations] is a question we save for later decisional development." *Id*. at 553 n 7.

In *Mouradian*, this Court reached the issue expressly reserved by our Supreme Court in *Scarsella*, i.e., whether a grossly nonconforming affidavit of merit tolls the statute of limitations. The *Mouradian* plaintiffs filed a complaint alleging two acts of malpractice: (1) that a Dr. Goldberg committed malpractice during a first surgery on the plaintiff's eye; and (2) that Dr.

Goldberg, the anesthesiologist, and a certified nurse anesthetist inappropriately administered anesthesia during a second eye surgery. *Mouradian, supra* at 567-568. The plaintiffs did not file an AOM with their complaint but filed one on a later date. The trial court granted summary disposition in favor of defendants, holding that the filing of the complaint alone failed to toll the period of limitations. *Id*. at 570. This Court affirmed the trial court with respect to the first surgery because the statute of limitations had expired before the AOM was filed. *Id*. 571. Regarding the second surgery, this Court held that the plaintiffs had timely filed their AOM before expiration of the period of limitations but the affidavit they filed was "grossly nonconforming" to MCL 600.2912d(1) and therefore did not commence a complaint against the defendants for any negligence arising from the second surgery. *Id* at 574. Specifically, this Court found that the plaintiffs' affidavit of merit failed to contain the requisite statements required by MCL 600.2912d concerning claims of alleged malpractice as to Dr. Goldberg as opposed to other defendants in the case. *Mouradian, supra* at 573. Because the AOM was "grossly nonconforming" to § 2912d, this Court held, "as a matter of law, [the] plaintiffs' complaint against defendants for the second surgery was not commenced because of their failure to file an affidavit of merit before the period of limitations expired . . . , and summary disposition is appropriate." *Id* at 574. The Court also observed that "because the affidavit does not certify the merit of claims against defendants for the second surgery, its filing does not fulfill the goal of MCL 600.2912d to prevent frivolous medical-malpractice actions." *Mouradian, supra* at 575.

In *Geralds, supra* at 233-234, this Court affirmed the trial court's striking of the plaintiff's AOM because a doctor who was board-certified in the same specialty as the doctor who allegedly committed malpractice did not sign it. The issue on appeal was whether the defective affidavit filed together with the complaint was sufficient to toll the statute of limitations. The *Geralds* Court held the statute was not tolled, and opined:

> Semantics aside, whether the adjective used is "defective" or "grossly nonconforming" or "inadequate," in the case at bar, plaintiff's affidavit did not meet the standards contained in MCL 600.2912d(1) and failed to meet the express language of MCL 600.2169(1) because the affiant was a doctor with a different board certification than third-party defendant's board certification.
>
> We hold that plaintiff's affidavit was defective and did not constitute an effective affidavit for the purpose of MCL 600.2912d(1) and, therefore, plaintiff filed a complaint without an affidavit of merit sufficient to commence a medical malpractice action. [*Geralds, supra* at 240.]

In *Kirkaldy v Rim (On Remand)*, 266 Mich App 626, 635 n 3; 702 NW2d 686 (2005), a panel of this Court, while urging a fresh review by our Supreme Court of *Scarsella* and its progeny, observed that "*Geralds* . . . eliminated any distinctions between nonconforming and grossly nonconforming affidavits in general."

In the present case, plaintiffs' AOM properly identified the applicable standard of care as requiring "proper review and interpretation of radiology studies" and "timely notification of primary physician of abnormal findings." But the affiant did not thereafter certify the merit plaintiffs' complaint about the alleged negligence of Drs. Messana and Cheney concerning the chest x-rays. Like the AOM in *Mouradian* that did not link Dr. Goldberg to the malpractice allegedly committed during the plaintiff's second eye surgery, the AOM here did not link either

Dr. Messana or Dr. Cheney to the malpractice allegedly committed in connection with plaintiff's chest x-rays, only plaintiff's CT scans.

Therefore, plaintiffs' AOM does not conform to the requirements of MCL 600.2912d(1) with respect to plaintiffs' chest x-ray claims. The AOM here did not contain an opinion with respect to the chest x-rays "that the applicable standard of practice or care was breached," or "[t]he actions that should have been taken or omitted [by defendants] to have complied with the applicable standard of practice or care," or "[t]he manner in which the breach of the standard of practice or care was the proximate cause of [plaintiffs'] injury." *Id.* In failing to certify the merit in plaintiffs' claims concerning the chest x-rays, the AOM also did not fulfill the statute's purpose of preventing frivolous malpractice actions. *Mouradian, supra* at 575. Consequently, the trial court erred by not granting defendants' motion for partial summary disposition on the basis of plaintiffs having failed to comply with MCL 600.2912d(1) with respect to claims of malpractice regarding the chest x-rays. *Geralds, supra* at 240; *Mouradian, supra* at 574.

Plaintiff argues that the issues defendants have asserted concerning the failure to include their chest x-ray claims in the NOI and the AOM have been rendered moot by their filing on September 22, 2005 of an amended NOI. In addition, plaintiffs assert they can revive their chest x-ray claims after dismissal without prejudice simply by moving to amend their complaint to allege anew the same claims. But because the limitations period expired before plaintiffs submitted their amended NOI, plaintiffs' arguments are without merit. See *Scarsella, supra* at 551-552; see, also, *Kirkaldy, supra* at 636 (Where the plaintiff's AOM is defective and the statute of limitations has expired, "*Geralds* and *Mouradian*, with their underlying reliance on *Scarsella*, dictate dismissal with prejudice.").

Finally, plaintiffs' complaint only asserts that ADI is vicariously liable for the actions of its employees, Drs. Messana and Cheney. Consequently, the trial court should also grant partial summary disposition to ADI with respect to plaintiffs' chest x-ray claims.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder